Supreme Court, U.S.
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No. 99-1194

IN THE

SUPREME COURT OF THE UNITED STATES

LEW WARDEN,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA, et al,

Respondent.

APPENDICES TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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TABLE OF CONTENTS

Page no.

1. **APPENDIX 1** ..... **1 - 27**

   DEFENDANTS LORNA MAYNARD, CAROLE ROSSI, AND THE STATE BAR OF CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION OF ISSUES, August 28, 1995.

2. **APPENDIX 2** ..... **29 - 67**

   SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANTS STATE BAR, MAYNARD AND ROSSI'S MOTION FOR SUMMARY JUDGMENT, August 28,1995

3. **APPENDIX 3** ..... **69 - 83**

   DEPOSITION OF LEW WARDEN, Thursday, August 18, 1994

4. **APPENDIX 4** ..... **85 - 87**

   PETITION FOR REVIEW BY THE STATE BAR OF CALIFORNIA AND TRANSFER OF RELATED CAUSE PENDING BEFORE SAME COURT OF APPEAL AND REQUEST TO EXPEDITE REVIEW AND DISPOSITION

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
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LEW WARDEN, Plaintiff, v. THE STATE BAR OF CALIFORNIA, LORNA MAYNARD, CAROLE ROSSI, et al., Defendants.	Case No. 734372-4 DEFENDANTS LORNA MAYNARD,CAROLE ROSSI, AND THE STATE BAR OF CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION OF ISSUES Date: August 28, 1995 Time: 10:00 a.m. Dept: 81 Trial Date: Sept. 29, 1995

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff by this action for declaratory and

injunctive relief and damages challenges the quasi-legislative action of the State Bar of California in adopting and promulgating Minimum Continuing Legal Education Rules and Regulations ("MCLE Regulations")[1] as authorized and required by California Rule of Court, rule 958 ("Rule 958"). Plaintiff claims that the MCLE Regulations are invalid as violative of plaintiff's rights to equal protection under the federal and state constitutions insofar as they allegedly discriminate against plaintiff because of his age, name, the manner in which he practices his profession, and because the MCLE Regulations exempt from the MCLE requirements retired judges, officers and elected officials of the State of California, full-time professors at law schools, full-time employees of the State of California and full-time employees of the United States Government. (Complaint,

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[1] The State Bar's MCLE Regulations are included in the defendants' Evidence in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication, as Exhibit 1(a)(1).

pp. 5:11-6:20.)

Plaintiff further alleges that the ministerial action of the State Bar in enrolling him as an inactive member not entitled to practice law until he chose to complete the required hours of MCLE study violated plaintiff's right to due process under the federal and state constitutions in that he effectively was suspended without prior notice and an opportunity to be heard. (Complaint, p. 9:10-20.)

Plaintiff was required to complete 12 hours of educational activities by January 31, 1993, as part of the overall requirement of 36 hours every 36 months. (Complaint, p. 5:14-19.) (See MCLE Rules and Regulations, hereinafter "MCLE Regulations", sections 2-3.) Although plaintiff received several notifications of the compliance requirements, he deliberately refused to comply and was involuntarily placed on administrative inactive status on July 19, 1993. (Complaint, p. 2:27-3:7.)

As will be seen from the argument portion of this memorandum, plaintiff's complaint does not state facts

sufficient to warrant the granting of either declaratory or injunctive relief because plaintiff has failed to allege a cause of action for deprivation of his constitutional rights. In addition, the circumstance that substantial public interest will be served by allowing the MCLE requirements generally to be effectuated all militate against granting either declaratory or injunctive relief. Furthermore, these defendants are absolutely immune from liability for alleged violation of plaintiff's federal and state constitutional rights.

STATEMENT OF FACTS

All attorneys licensed to practice law in California must be members of the State Bar. (Cal. Const., art. VI, § 9; Bus. & Prof. Code, § 6002; Keller v. State Bar of California (1990) 496 U.S. 1, 110 S.Ct. 2228, 2235.) At present, the State Bar's active membership totals about 117,000.

In 1989, the California Legislature adopted Business and Professions Code section 6070, setting a

mandatory continuing legal education program for California lawyers into motion. (Bus. & Prof. Code, § 6070, subd. (a).) Instead of creating a continuing education program, the statute is cast in a conditional manner: "If the California Supreme Court adopts a rule authorizing the State Bar to establish and administer a mandatory continuing legal education program,..." then the State Bar must administer it. (Bus. & Prof. Code, § 6070, subd. (a).) The legislation further provided that if the Supreme Court ordered a mandatory continuing legal education program into existence, certain enumerated categories of attorneys would be exempt from the requirements. (Bus. & Prof. Code, § 6070, subd. (c).)

Pursuant to the legislation, the State Bar on July 19, 1990, filed with the Supreme Court a request for a new rule of court, authorizing the State Bar to establish a mandatory continuing legal education program.

On December 6, 1990, the Supreme Court ordered that the California Rules of Court be amended to add rule

958. Rule 958 mandated the State Bar to establish and administer a minimum continuing legal education program. The new Rule of Court also set forth additional categories of attorneys who would be exempt from the education requirements.

On December 8, 1990, the State Bar adopted the proposed MCLE Rules and Regulations (23 West's Cal. Code Ann. Rules, pt. 2 1981 ed., 1994 Cum. supp. pp. 608-619, hereafter "MCLE Regulations") to implement the program ordered into effect by the Supreme Court. The State Bar MCLE Regulations added a third category of exemptions: Section 6.2 of the MCLE Regulations specifies that members may request a good cause exemption from compliance with, or modification of, the MCLE requirements. (MCLE Regulations, § 6.2.)

Reading Rule of Court 958 and Business and Professions Code section 6070 together, all members of the State Bar are required to complete 36 hours of CLE during a 36-month period.

Attorneys may accrue MCLE credit in a variety of ways and at their own pace, including self-study, so long as the total number of credits are earned by the end of the compliance period. (See MCLE Regulations, §§ 4.1, 4.2, 5.2, 5.3, 5.4.) In order to make the administration of the program manageable, compliance reporting was set up as a three-stage process, with only one third of the State Bar's membership being required to report on their compliance each year. (See MCLE Regulations, §§ 3.1-3.4.)

In order to be fair to all members, the initial compliance period was set up to pro-rate the amount of required courses for each of the three compliance groups, i.e., Group 1, A-G was required to complete 36 hours by January 31, 1995; Group 2, H-M was required to complete 24 hours by January 31, 1994; and Group 3, N-Z was required to complete 12 hours by January 31, 1993. (MCLE Regulations, §§ 3.1, 3.4.)

Plaintiff, being in Group 3, was required to

complete 12 hours by January 31, 1993. On April 23, 1993, plaintiff was notified that he was not in compliance with the MCLE Regulations. Plaintiff failed to comply and on June 29, 1993 he was given a final notice that non-compliance with the MCLE requirements would result in his being administratively enrolled inactive. Plaintiff was administratively enrolled inactive on July 19, 1993.

I. ARGUMENT

1. PLAINTIFF HAS NOT ALLEGED SUFFICIENT FACTS TO CONSTITUTE A CAUSE OF ACTION FOR VIOLATING PLAINTIFF'S RIGHTS UNDER THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

a. Equal Protection. Plaintiff alleges that the MCLE Regulations violate the Equal Protection clause of the United States Constitution and the Constitution of the State of California in that, the MCLE Regulations discriminate against plaintiff because of his age, name, manner of practice as a sole practitioner, and because the MCLE Regulations exempts certain categories of attorneys. (Complaint, pp. 4:13-6:20.)

Defendants agree with plaintiff's assertion that the proper standard of review is the rational basis test. (Complaint, p. 4:26-27; 6:22-23.) In ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest, the classification is upheld if it bears a rational relationship to a legitimate state purpose. (Giannini v. Real (9th Cir. 1990) 911 F.2d 354, 358, cert. denied, 498 U.S. 1012.)

With respect to the constitutionality of MCLE programs, a federal district court in Colorado upheld the constitutionality of that State's mandatory continuing legal education program against the charge, among others, that it violated the attorney's Fourteenth Amendment rights of due process and equal protection. In affirming the lower court's dismissal of the action the court stated:

> "Ample precedent exists supporting the authority to prescribe minimum levels of legal competency, measured by a bar examination, as a prerequisite to admission to a state bar. (Citations omitted) A fortiori, a state can require an attorney to take reasonable steps to maintain a suitable level of competency, so long as such requirements

> have a 'rational' connection with the [attorney's] fitness or capacity to practice law. (Citations omitted) We cannot say that the CLE requirements in Colorado have no rational relation connection to a lawyer's suitability to practice law."

(Verner v. State of Colorado (D. Colorado 1982) 533 F.Supp. 1109, affd. 716 F.2d 1352, 1353, cert. den. 466 U.S. 960, 104 S. Ct. 2175.)

Plaintiff first alleges that the MCLE program discriminates against him because of his age, in that he was born in 1920. (Complaint, p. 4:14-20.) All active members of the State Bar not exempt from compliance under MCLE Regulations 6.0 et. seq. are required to comply with the MCLE Regulations. Nowhere in the MCLE Regulations is age listed as a means of identifying members for compliance. Age is not a factor when determining whether or not a member must comply with the MCLE Regulations.

Plaintiff next alleges that he is being discriminated against because his name begins with a "W". (Complaint, p. 4:14-20.) Three compliance groups were created

according to the alphabet. Compliance group one consists of members whose names begin with the letters A-G. The initial compliance period for the group requires each member to complete 36 hours of activities by January 31, 1995. (MCLE Regulations, §§ 2.1 and 3.2.) Compliance group two consists of members whose names begin with the letters H-M. The initial compliance period for this group required each member to complete 24 hours of activities by January 31, 1994. (MCLE Regulations, § 3.3.) Compliance group three consists of members whose names begin with the letters N-Z. The initial compliance period for this group required each member to complete 12 hours of activities by January 31, 1993. (MCLE Regulations, § 3.4.)

Although plaintiff's group (N-Z) was the first to comply with the MCLE Regulations, he was only required to complete 12 hours of activities. Under the initial compliance period each group was required to complete the same amount of hours of activities during the same

time period, i.e., Group 1, 36 hours in 36 months, Group 2, 24 hours in 24 months, and Group 3, 12 hours in 12 months. Therefore, plaintiff's requirements are the same as any other member in another compliance group.

Plaintiff further alleges that he is being discriminated against because as a sole practitioner he cannot benefit from in-house training available in firms, and, consequently, he is forced to attend expensive, time-consuming, and wasteful lectures. (Complaint pp. 4:14-27; 6:15-21.) As previously stated, MCLE requirements apply to all non-exempt members of the State Bar. Plaintiff completely ignores the fact that he, like any other member, can fulfill his educational requirements in a variety of ways: viewing videotapes or film instruction, listening to audiotapes, speaking in approved education activities, and participating in self-assessment testing (open-book tests). (MCLE Regulations, § 4.0 et.seq.)

Clearly the MCLE Regulations do not pertain to a member's name, age, and type of practice the member

engages in, but are neutral on their face.

Plaintiff next alleges that he is being denied equal protection because of the program's allegedly discriminatory classifications in that the program exempts members who are retired judges, officers and elected officials of the State of California, full time professors at law schools accredited by the State Bar or the ABA, and employees of the State of California, and the United States government. (Complaint, p. 6:4-14.)

There is no fundamental right to practice law and in examining claims of discrimination in professional licensing, the appropriate standard is the rational relationship test. (See, e.g., Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, 1327-1328, cert. denied 474 U.S. 916, 106 S.Ct. 241.) The question whether there is a conceivable legitimate basis for exempting certain limited categories of California attorneys from the MCLE requirements must be answered in the affirmative. Indeed, one conceivable basis is apparent from the more fully

expressed of the exemptions pertaining to state and federal employees, as well as from administrative interpretations of the exemptions by the State Bar's Committee on MCLE as enunciated in the MCLE Guidelines issued to date.[2] By express language in section 6070 and rule 958, exemptions for active members of the State Bar who are employed by the state or federal government are limited to "full-time" employees and those who are "acting within the scope of their employment." This has been interpreted in the Guidelines to mean that state and federal employees are exempt only if their practice of law is limited to the performance of their duties as state or federal employees, and that if they engage in practice outside the scope of their employment, including pro bono work or legal work for friends or family, the attorneys lose their exemptions. (See MCLE Guidelines 6.1.4 and 6.1.5.) A

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[2] The contemporaneous administrative interpretation of a statute by an administrative agency is entitled to great weight and will not be departed from unless clearly erroneous. (Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 647.)

conceivable, legitimate rational basis, then, for the exemption for full-time state and federal government lawyers is that they do not engage in practice outside the scope of their employment and therefore do not pose the same risk of harm to members of the public as do the majority of attorneys. Indeed, it is common knowledge that government attorneys have extensive in-house and associational continuing education programs, and are subject to peer review and promotion examination. Moreover, most governmental agencies self-insure against the risk of attorney negligence or malfeasance, and government attorneys who do not meet performance standards are subject to termination.[3]

In addition, other rational bases may be posited for the remaining exemptions, consistent with the established equal protection doctrine that legislation need not fully

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[3] Accordingly, subdivision (b) of section 6070 provides specific approval for programs by the California District Attorneys Association and the California Public Defender Association.

cover the field and may address "degrees of evil." (See, e.g., Williamson v. Lee Optical of Oklahoma (1955) 348 U.S. 483, 489, 75 S.Ct. 461, 465; Leavenworth Properties v. City and County of San Francisco (1987) 189 Cal.App.3d 986, 992-993.)[4] As Professor Tribe has noted, "[w]ithin very broad limits, courts have traditionally exhibited extreme deference to the legislative definition of 'the general good,' either out of judicial sympathy for the difficulties of the legislative process, or out of a belief in judicial restraint generally." (Tribe, American

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[4] Thus, full-time professors engage in research, writing and teaching and are on the cutting edge of new developments in the law, so that the public interest is not significantly furthered by MCLE. Moreover, they do not handle client funds or administer trust accounts. Retired judges will have been at the forefront of interpreting and applying the law, and their retired status ought to justify exemptions, particularly if they continue to involve themselves in dispute resolution as arbitrators or mediators and do not represent clients or administer trust funds. And with regard to state officers and elected officials, one might assume that at least for the most part, they will not find time to be actively engaged in private practice and will also be situated to be well informed about new legislative developments in the law, especially those relating to their particular areas of expertise.

Constitutional Law (2d ed. 1988) ch. 16, § 16.2, p. 1440.)[5]

b. Procedural Due Process. Finally, plaintiff alleges that his due process rights were violated because the MCLE Regulations make no provision for a hearing before a State Bar member's license to practice law can be suspended. (Complaint, p. 4:14-5:10.)

Plaintiff became aware of the MCLE requirements in 1992, and knew that if he did not comply, an "attempt" would be made to place him on inactive status. Moreover, plaintiff was notified on April 23, 1993, that he was not in compliance with the MCLE Regulations and that he had 60 days within which to provide proof of compliance (i.e., proof of completion of 12 hours of MCLE study) or be

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[5] Although plaintiff claims to have been suspended form the practice of law, (Complaint, p. 6:4-8) he was in fact administratively enrolled as an inactive member. The distinction is important because being placed on administrative inactive is separate from a disciplinary suspension. Enrolling a member inactive without going through the discipline system is rationally related to the State Bar's goal in keeping members out of the discipline system and the potential stigma of having a disciplinary suspension on their record. Moreover, plaintiff at all times has had it within his power to return to active status simply by completing the required MCLE compliance card. (See Exhibit 1(a)(10).)

enrolled as an inactive member. Thereafter, on June 29, 1993, pursuant to section 13.2 of the MCLE Regulations plaintiff was sent a final notice informing him that if he failed to complete the MCLE requirements he would be enrolled as an inactive member on July 17, 1993. On July 30, 1993, plaintiff was informed that he had been enrolled as an inactive member. (See MCLE Regulations, section 14.0, et. seq.)

While plaintiff implicitly concedes, as he must, that he received ample notice of the MCLE requirements, and was aware that the MCLE Regulations provided for transfer to inactive status on failure to comply, he nevertheless asserts that due process requires that he be afforded some sort of "hearing" before such transfer. Quite clearly, however, there were no disputed issues of fact to be determined, plaintiff having declared his intention never to comply. And neither was there any discretion to be exercised since the precipitating event -- i.e., failure to furnish proof of compliance -- admittedly

occurred, the State Bar then being under a mandatory duty to ministerially transfer plaintiff to inactive status. (See Bus. & Prof. Code § 6070(a) and Rules of Court, rule 958(d) [a member who fails to satisfy MCLE requirements "shall be enrolled as an inactive member"]. It is well established that the Legislature constitutionally may provide for the "automatic" revocation or suspension of a license upon the happening of a specified event, without the necessity of a hearing, where there are no questions of fact to be resolved or judgment to be exercised. See DiGenova v. State Board of Education (1955) 45 Cal.2d 255, 260-263; Slaughter v. Edwards (1970) 11 Cal.App.3d 285, 293-294.

As the California Supreme Court explained in Coleman v. Dept. of Personnel Admin. (1991) 52 Cal.3d 1102, 278 Cal.Rptr. 346, 354, citing Texaco, Inc. v. Short (1982) 454 U.S. 516, 102 S. Ct. 781, no impermissible legislative limitation of procedural protections is involved in the case of a statute that provides a self-executing lapse

of a property interest upon the owner's failure to perform a reasonable condition that indicates a present intention not to retain the interest. Thus, where no factual determination is necessary and no discretion is to be exercised, no process is due because the owner of the property, not the state, terminates the interest through inaction.

Moreover, under the rationale of Coleman, plaintiff is not entitled to any post-suspension evidentiary hearing because inactive enrollment for failure to comply with MCLE is not the equivalent of a disciplinary suspension and because again there are no factual issues to be resolved or discretion to be exercised, plaintiff himself being able to obtain his reinstatement administratively, simply by furnishing proof of completion of the required hours of MCLE study.

2. PLAINTIFF HAS NOT ALLEGED SUFFICIENT FACTS TO STATE A CAUSE OF ACTION FOR BREACH OF CONTRACT

Plaintiff alleges that upon his admission to the

practice of law in the State of California, a written and unwritten contractual relationship was established between himself and the State Bar, which included the implied covenant that defendants would act fairly toward and in good faith with plaintiff. Plaintiff further alleges that defendants both contractually and tortiously, breached said implied covenant of good faith and fair dealing. (Complaint, p. 9:23-10:6.)

It is well settled that an application for a license or permit to practice law does not create a contract. (Engel v. McCloskey (1979) 92 Cal.App.3d 870, 883.) Therefore, plaintiff's cause of action for damages for breach of contract has no merit.

3. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR DAMAGES AGAINST THESE DEFENDANTS FOR ALLEGED VIOLATION OF HIS FEDERAL CIVIL RIGHTS (42 U.S.C. § 1983)

Plaintiff has attempted to state a cause of action against the State Bar as an entity and two of its employees in their respective official capacities as attorney and

administrative assistant for alleged violation of plaintiff's civil rights, presumably pursuant to 42 U.S.C. section 1983. (See Complaint, par. XVIII, at 10:7-18.) Plaintiff fails to state a federal law claim for damages, however, because neither a state agency nor its employees sued in their official capacities are "persons" within the meaning of 42 U.S.C. section 1983. (See Will v. Michigan Dept. of State Police (1989) 491 U.S. 58, 109 S. Ct. 2304, 2308-2309, 2312.) Moreover, even if the State Bar defendants were suable "persons", it is well established that the State Bar and its officials enjoy absolute quasi-judicial and quasi-legislative immunity from federal civil rights actions for damages arising out of their conduct of attorney licensing proceedings. (See Rosenthal v. Vogt (1991) 229 Cal.App.3d 69, 76; Lebbos v. State Bar (1985) 165 Cal.App.3d 656, 665-666; Levanti v. Tippen (S.D. 1984) 585 F.Supp. 499; See also Rosenthal v. Justices of the Supreme Court of California (9th Cir. 1990) 910 F.2d 561, 565-566, cert. denied (1991) 498 U.S. 1087 [111 S.Ct.

963]; Govt. Code §§ 818.4, 821.2 [public entity and public employees not liable for injury caused by denial or suspension of a license].) This immunity applies no matter however motivated or however intrinsically erroneous such proceedings may have been. (See Greene v. Zank (1984) 158 Cal.App.3d. 497 at 507; Rosenthal v. Justices, supra, 910 F.2d at 565-566.)

4. THE STATE BAR DEFENDANTS ARE IMMUNE FROM TORT LIABILITY FOR DAMAGES FOR ALLEGED VIOLATION OF STATE LAW, UNDER THE TORT CLAIMS ACT'S LICENSING ACTIVITY PROVISIONS, AND UNDER THE COMMON LAW DOCTRINES OF QUASI-JUDICIAL AND LEGISLATIVE IMMUNITY.

Decisive law establishes that just as the State Bar and its employees are immune from federal civil rights damages liability for their licensing activities, so are they immune under state law. See Rosenthal v. Vogt, supra, 229 Cal.App.3d at 74. [State Bar and its officer and employees are immune from liability for alleged negligent and intentional infliction of emotional distress and breach of fiduciary duty]. Engel v. McClosky, supra, 92

Cal.App.3d at 881-883, 884-887. [State Bar Committee of Bar Examiners and its employees immune from liability for damages for allegedly negligently performing and intentionally delaying moral character investigations.]

5. PLAINTIFF HAS NOT ALLEGED SUFFICIENT FACTS TO DEMONSTRATE IRREPARABLE INJURY JUSTIFYING THE EXTRAORDINARY EQUITABLE REMEDY OF A BLANKET PROHIBITORY INJUNCTION AGAINST THE IMPLEMENTATION OF THE MCLE PROGRAM

As pointed out above, plaintiff has not only an available administrative remedy before the State Bar by way of request for waiver of the requirements he objects to, but also a remedy by way of direct original petition to the Supreme Court to consider all their constitutional challenges to the facial validity of the MCLE Regulations and Supreme Court Rule 958. Injunction is an extraordinary power and should be granted only in those cases where it fairly appears on all papers presented that plaintiff will suffer imminent or irreparable injury. (Code Civ. Proc., § 526, subd. (2); City and County of San

Francisco v. Market St. Ry. Co. (1950) 95 Cal.App.2d 648.)

As Witkin points out, an injunction is regarded as an extraordinary remedy which should only be granted, with caution, and indeed which should be denied where there are other judicial or administrative remedies and no real threat of immediate and irreparable injury. (See 6 Witkin, Cal. Procedure (3d. ed. 1985) Provisional Remedies, §§ 253-254, 267, 277-278, 282, pp. 221, 230, 238-239, 247.) And as Witkin also points out the interest of the public is a separate, independent factor to be considered in determining whether to grant injunctive relief. (Id. at § 282, pp. 241-242.) Here, it is submitted, the interests of the public -- or at least the consumers of legal services among them -- would be substantially disserved by an injunction against implementing the MCLE requirements for California's 115,000 active lawyers.

6. THE STATE BAR IS ABSOLUTELY IMMUNE FROM PUNITIVE DAMAGES

Government code section 818 provides:

> "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

The State Bar, as a governmental entity is absolutely immune from the imposition of punitive damages. In addition, with respect to the individual defendants, specific factual allegations are required to support a claim for punitive damages. (Brousseau v. Jarrett (1977) 73 Cal.3d 864.) In this case, plaintiff has failed to allege any specific facts other than inferences which would support a cause of action for punitive damages.

CONCLUSION

For all of the foregoing reasons, defendants respectfully request that the demurrer be sustained without leave to amend; and that the action be dismissed.

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DATED: July 31, 1994

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
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LEW WARDEN Plaintiff, v. THE STATE BAR OF CALIFORNIA,LORNA MAYNARD,CAROLE ROSSI, et al., Defendants.	Case No. 734372-4 SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANTS STATE BAR, MAYNARD AND ROSSI'S MOTION FOR SUMMARY JUDGMENT Date: August 28,1995 Time: 10:00 a.m. Dept.: 81 Trial Date: Sept. 29, 1995

Defendants State Bar of California, Lorna

Maynard and Carole Rossi submit the following Statement

APPENDIX 2

of Undisputed Material Facts together with references to supporting evidence, pursuant to Code of Civil Procedure, section 437(b). By reason of these facts, it is established that there is no merit to the following several claims or legal theories, not separately stated, on which plaintiff seeks recovery of compensatory and punitive damages, as well as declaratory and injunctive relief, arising out of the State Bar's action in enrolling plaintiff on administrative inactive status as of July 19, 1993, for plaintiff's deliberate refusal to complete minimum continuing legal education, as required by section 6070 of the Business and Professions Code, rule 958 of California Rules of Court, and the State Bar's Minimum Continuing Legal Education Rules and Regulations.

CLAIM NO. 1, NO DENIAL OF PROCEDURAL DUE PROCESS:

(Complaint, paragraphs III, IV, V, VI, part of VII [5:3-9] and XV) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points and

Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at pp. 11-13.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
1. Plaintiff is a 75 year old attorney who was first admitted to practice in California in 1953, and who at all times since then until July 19, 1993, was an active member in good standing of the State Bar of California, engaged in the practice of law as a sole practitioner. Throughout most of this period, plaintiff's office has been at various addresses in the Bay Area where he shared	1. Complaint, at 2:12-21, 4:19-20; 5:14. Plaintiff's answers to defendants form interrogatories (set one), nos. 2.1, 2.6(b) and 8.2, Ex. 1(b), at 2:1; 2:22; 4:4. Plaintiff's deposition. Ex. 1(a) at 16:5-25, 93:2-8.

space with other attorneys, but plaintiff has practiced his "specialty", civil litigation at the trial and appellate level, throughout the state.

2. By July, 1993, plaintiff was living aboard his yacht, "Rocking Chair," and was travelling between and stopping at various marinas and harbors. While plaintiff did not consider himself formally retired and while he continued to work on litigation matters from his yacht, he nevertheless had reduced his production of

2. Plaintiff's answers to defendants' form interrogatories (set one) no. 2.5, Ex. 1(b), at 2:5-18. Plaintiff's deposition, Ex. 1(a), at 11:8-20, 31:4-23, 32:7-34:4, 44:19-22, 55:12-19. 56:4-15, 58:7-14, 83:4-8.

income and the taking on of new cases. Plaintiff hoped to continue working on a part-time basis as a paralegal for other attorneys, but did not want to be responsible for cases.	
3. In June 1991, and again in March 1992, the State Bar mailed to all its members at their last known addresses as shown on the State Bar's official records, notices and instructional materials concerning the study and reporting requirements of the State Bar's Minimum Continuing Legal	3. Plaintiff's deposition, Ex. 1(a) at 11:21-12:17. Declaration of Jennifer Blackford, Ex. 2, at 2:3-26. Certified copies of Custodian of Records, Ex. 3.

Education Program ("MCLE"), which went into effect on September 1, 1991, and the study requirements, of which began February 1, 1992.	
4. Plaintiff claims not to have received the materials described in fact 3, above, but admits having learned of the MCLE program in 1992 from other attorneys and people in his office.	4. Plaintiff's deposition, Ex. 1(a) at 11:21 to 16:4, 81:25-82:11, 100:19-22.
5. Plaintiff understood in 1992 that if he did not comply with the MCLE requirements, there would be "an attempt" to	5. Plaintiff's deposition, Ex. 1(a), at 15:7-16:4.

place him on inactive.

6. Plaintiff considers MCLE a nonsensical and expensive waste of time. Plaintiff believes that as a result of his many years of practice and through researching matters very extensively, he knows as much or more law than those who provide MCLE programs. Plaintiff has vowed never to attend a MCLE lecture.	6. Plaintiff's deposition, Ex. 1(a), at 79:2-82:11, 90:2-8, 97:8-13, 103:1-3.
7. Sometime before January 31, 1993, plaintiff received from the State Bar at least part of a five page MCLE compliance letter	7. Plaintiff's deposition, Ex. 1(a), at 84:16-85:8, 90:2-8, 102:10-19, 110:10-114.17.

mailed to all members in MCLE compliance group 3 (those members whose last names began with the letters N-Z). (Plaintiff was able to find in his file only pages 1, 2 and 5 and part of page 4.) This letter enclosed MCLE worksheets to record hours of studies completed and an MCLE compliance card to be returned to the State Bar attesting to completion of at least 12 hours of study by February 1, 1993. Plaintiff did not fill out and return the card because he had not complied.

8. Plaintiff first read the MCLE rules in about April 1993. At that time, plaintiff believed he had three years to comply with the MCLE program requirements, and he determined not to comply because he believed that by the time three years had passed he would be retired or deceased. By early July, 1993, however, when it became apparent that proof of compliance would be required after one year, plaintiff determined he would not participate because he believed the	8. Plaintiff's deposition, Ex. 1(a), at 13:8-16:4, 17:24-19:1, 21:22-24, 35:13-16, 36:17-19, 81:19 to 85:8, 91:7-15, 94:25-95:1, 102:10.

MCLE requirements were unconstitutional; and plaintiff decided either to make the State Bar "back off" or to litigate it.	
9. Plaintiff received from the State Bar a MCLE Non-Compliance 60 Day Notice dated April 23, 1993, informing plaintiff that if he did not forward proof of compliance with the MCLE requirements by June 22, 1993, he would be enrolled as an inactive member not permitted to practice until proof of compliance was received	9. Plaintiff's deposition, Ex. 1(a), at 17:24-19;11, 109:21-110:5.

by the State Bar. Plaintiff read and understood this notice.

10. Plaintiff received from the State Bar a MCLE Non-Compliance Final Notice dated June 29, 1995, advising plaintiff that he would be enrolled as an inactive member effective July 17, 1993, and continuing until such time as he had complied with the MCLE requirements. Plaintiff read and understood this notice.

10. Plaintiff's deposition, Ex. 1(a), at 19:2-21, 109:21-110:5.

11. By letter dated July 9, 1993, written by

11. Plaintiff's deposition, Ex. 1(a), at

plaintiff and received by the State Bar, plaintiff responded to the final notice described in fact 10, above, and advised the State Bar that he contested both the constitutionality of the State Bar's "absurd MCLE program" as well as the constitutionality of the "summary procedures" for administratively placing non-complying members on inactive status without a pre-deprivation hearing.	19:22 to 21:12, 109:21-110:5.
12. By letter dated July 23, 1993, defendant Lorna Maynard, a senior administrative assistant	12. Plaintiff's deposition, Ex. 1(a), at 24:12-25:17, 26:13-27:7, 109:21-110:5.

employed by the State Bar responded to plaintiff's letter described in fact 11, above, and advised that it had been referred to the State Bar's General Counsel for response. Defendant Maynard's said letter indicated that a copy ("cc") had gone to defendant Carole Rossi.

13. Plaintiff thereafter received from the State Bar a Notice of Enrollment on Administrative Inactive Status dated July 30, 1993, advising him that he had been placed on administrative inactive

13. Plaintiff's deposition, Ex. 1(a), at 22:1-23:10, 109:21-110:5.

status as of July 19, 1993, and that he could secure return to active status by submitting proof of MCLE compliance and payment of a $50.00 non-compliance fee. Plaintiff read and understood this notice.

14. Plaintiff was one of some 380 attorneys in compliance group 3 (last names beginning with N-Z) who did not furnish proof of compliance with MCLE requirements and who on July 19, 1993, were administratively enrolled as inactive	14. Defendant's Request for Judicial Notice, Ex. JN1-JN2. Plaintiff's deposition, Ex. 1(a), at 22:16-23:10, 28:6-12, 105:6-14.

members by defendant State Bar.	
15. Plaintiff did not request a good cause exemption or modification of MCLE requirements under MCLE Regulations, sections 6.2 to 6.3.	15. Plaintiff's deposition, Ex. 1(a), at 36:17-37:5, 105:6-106:5.
16. No evidentiary hearing was granted to plaintiff prior to his being administratively enrolled as an inactive member.	16. Complaint, at 2:26-3:6, 9:17-21. Plaintiff's deposition, Ex. 1(a), at 30:15-22, 100:15-101:4, 105:6-14.
17. Plaintiff responded to the notice of his enrollment as an inactive member by letter to the State Bar dated	17. Plaintiff's deposition, Ex. 1(a), at 27:8-28:16.

September 23, 1993, to the attention of defendant Maynard. Plaintiff expressed his "profound disagreement" with the State Bar's "useless, burdensome and expensive program" and threatened that if the State Bar did not "forthwith recall [its] suspension order and forthwith so advise all courts," plaintiff would bring an action for damages against the State Bar and each of its officers and employees who allegedly caused such suspension.

18. On or about October 7, 1993, plaintiff filed with the State Bar a "Claim of Damages" in which he asserted the State Bar's liability to him for lost income at the rate of approximately $6,000 per month and an unspecified sum for "emotional distress and upset" as the result of his having been placed on administrative inactive status for failure to comply with what he alleged were the MCLE's unconstitutional requirements. This claim was denied by the State	18. Complaint, paragraph XXIII at 11:9-1. Plaintiff's deposition, Ex. 1(a) at 11:9-11.

Bar on or about November 5, 1993.	
19. By letter dated October 22, 1993, defendant Rossi, an attorney employed by the State Bar as an Assistant General Counsel in its Office of General Counsel, replied to plaintiff's letters dated July 9, 1993, and September 23, 1993, and advised plaintiff that he had been enrolled as an inactive member for failure to comply with the State Bar's MCLE requirements pursuant to the express provisions of both	19. Plaintiff's deposition, Ex. 1(a) at 34:5-35:16.

Business & Professions Code section 6070(a) and rule 958(a), California Rules of Court, in addition to the MCLE Regulations. Defendant Rossi also acknowledged receipt of plaintiff's Claim for Damages dated October 7, 1993, and advised that it had been forwarded to the Board of Governors for Review.

20. Plaintiff at all times has had it within his power to be reinstated as an active member entitled to practice law by furnishing proof of his	20. MCLE Regulations, sections 15.1, 15.2. Plaintiff's deposition, Ex. 1(a), at 101:21-102:19, 103:1-3. MCLE Regulations,

compliance with the MCLE requirements and paying such fees as may be due, if any.	section 15.0.
21. Plaintiff did not seek review by the California Supreme Court of the State Bar's action in transferring him to inactive status, pursuant to rule 952(d), California Rules of Court.	21. Plaintiff's deposition, at 91:16-92:18.

CLAIM NO. 2, NO DENIAL OF EQUAL PROTECTION:

(Complaint, paragraphs VII, VIII, IX, X, XI, XII, XIII and XIV) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points and Authorities In Support of Motion for Summary Judgment or Summary Adjudication, at pp. 6-11.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
22. Plaintiff did not claim to be within any of the categories of persons exempted from the MCLE requirements by Business & Professions Code section 6070, California Rules of Court, rule 958, or MCLE Regulations 6.1 to 6.1.5, i.e. retired judges, officers and elected officials of the State of California, full-time professors at accredited law schools, full-time employees of the State of California, and full-time	22. Complaint, at 4:18-26, 6:9-13. Plaintiff's deposition, Ex. 1(a), at 95:3-96:20.

employees of the United States government; and plaintiff was not granted any such exemption.

23. At the time plaintiff was administratively enrolled on inactive status in July 1993, plaintiff was 73 years old and engaged in private practice as a sole practitioner. Plaintiff had not formally retired, but had reduced his production of income and was not taking on new cases, but trying to get out of it. Plaintiff did not want to be responsible for cases and

23. Complaint, at 4:18-23. Plaintiff's deposition, Ex. 1(a), at 16:16-25, 31:10-33:11, 55:12-13, 56:10-25, 57:1-59:6, 83:4-8.

hoped to work essentially as a paralegal for other attorneys.

24. As an attorney whose last name began with the letter "W," plaintiff was in what the MCLE Regulations identified as Compliance Group 3, comprised of those members whose last names began with the letters N-Z. Members in Compliance Group 3 were required to complete at least 12 hours of continuing legal education during the period February 1, 1992, to January 31,

24. Complaint, at 4:20, 5:14-26. Plaintiff's deposition, Ex. 1(a), at 84:10-24, 86:6-9, 88:9-19, 93:12-24. MCLE Regulations, sections 3.0-3.6, 12.0

1993, and to attest to such compliance by submitting a compliance card to the State Bar no later than February 1, 1993.

CLAIM NO. 3, NO BREACH OF EXPRESS OR IMPLIED CONTRACT:

(Complaint, paragraphs XVI and XVII) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at P. 14.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
25. There was no express agreement, written or oral, between plaintiff and defendant State Bar or any of its officers or employees regarding the	25. Plaintiff's answers to defendants' form interrogatories (set one) nos. 50.1 and 50.2, Ex. 1(b), at 7:11-8:14. Plaintiff's deposition, Ex.

action to be taken by the State Bar as the result of plaintiff's refusal to comply with the MCLE requirements.	1(a), at 106:6-11, 109:14-20.
26. Plaintiff's assertion of an implied-in-fact contractual covenant of good faith and fair dealing is based solely on the correspondence between the State Bar and plaintiff, in particular the letter to plaintiff dated July 23, 1993, from defendant Maynard and the letter to plaintiff dated October 22, 1993, from defendant Rossi, both of which	26. Plaintiff's answers to defendants' form interrogatories (set one) nos. 50.1 and 50.2, Ex. 1(b), at 7:11-8:14. Plaintiff's deposition, Ex. 1(a), at 103:24-104:12, 106:6-11, 109:15-18.

plaintiff contends impliedly represented that the State Bar would consider plaintiff's contentions that the MCLE program was unconstitutional and would confer with or respond to him before placing him on inactive status.	
27. Plaintiff's assertion of an implied-in-law contractual covenant of good faith and fair dealing is based entirely on the constitutional, statutory, decisional and rule of court law governing the relationship between	27. Plaintiff's answers to defendants' form interrogatories (set one) nos. 50.1 and 50.2, Ex. 1(b), at 6:25-7:10, 8:6-13. Plaintiff's deposition, Ex. 1(a), 104:1-10; 106:6-11; 109:14-20.

the State Bar and its members.

CLAIM NO. 4, NO CAUSE OF ACTION FOR TORTIOUS BREACH OF IMPLIED CONTRACTUAL COVENANT OF GOOD FAITH AND FAIR DEALING:

(Complaint, paragraph XVII) (See discussion in defendants' State Bar, Maynard and Rossi's Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at p. 14.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
28. Plaintiff's claim for damages for "tortious" breach of the implied contractual duty of good faith and fair dealing is based on the same undisputed facts stated immediately above, i.e.	28. See evidence listed immediately above, opposite facts nos. 25, 26 and 27.

nos. 25-27.

CLAIM NO. 5, NO BREACH OF PLAINTIFF'S FEDERAL CIVIL RIGHTS AND DEFENDANTS NOT "PERSONS" WITHIN THE MEANING OF 42 U.S.C. SECTION 1983:

(Complaint, paragraph XVIII) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at pgs. 14-15.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
29. Defendant State Bar is a constitutional agency in the judicial branch of state government that acts as the administrative arm of the California Supreme Court	29. See plaintiff's answers to State Bar Defendants' First Set of Special Interrogatories (set one) no. 1, Ex. 1(c), at 1:24-28. Plaintiff's deposition, Ex. 1(a), at

in all matters relating to the admission, discipline and reinstatement of attorneys.

29:2-5. See also, California Constitution, Article VI, section 6, Business & Professions Code section 6008, 6008.2; Saleeby v. State Bar (1985) 39 Cal.3d 547, 565; Rosenthal v. Justices (9th Cir. 1990) 910 F.2d 561, 565-566.

30. At all times mentioned in the complaint, defendant Carole Rossi was an attorney employed by the State Bar in its Office of General Counsel, as an Assistant General Counsel. At all such times,

30. Complaint, at 1:22-27. Plaintiff's Answers to Defendants' Form Interrogatories (set one) no. 14.1, Ex. 1(b), at 6:15-22, Plaintiff's Answers to Defendants' First Set of Special Interrogatories (set one)

defendant was acting within the scope and course of her official duties as such employee.	no. 1, Ex. 1(c), at 2:4-13, 3:15-16.
31. At all times mentioned in the complaint, defendant Lorna Maynard was an employee of the State Bar, assigned to its Office of Certification as a Senior Administrative Assistant in the Legal Unit. At all such times, defendant Maynard was acting within the scope and course of her official duties as such employee.	31. Complaint, at 1:22-27. Plaintiff's Answers to Defendants' Form Interrogatories (set one) no. 14.1, Ex. 1(b), at 6:15-22. Plaintiff's Answers to Defendant's First Set of Special Interrogatories (set one) no. 1, Ex. 1(c), at 2:1-13.
32. Plaintiff sued	32. Plaintiff's

defendant Rossi for damages because her name appeared as a recipient of a copy ("cc") of the letter dated July 23, 1993, from defendant Maynard to plaintiff, and because defendant Rossi wrote plaintiff a letter dated October 22, 1993. Plaintiff had no other contact with defendant Rossi, does not know her and never heard of her.	deposition, Ex. 1(a)(7) and 1(a)(9), at 59:7-68:22. Plaintiff's Answers to Defendants' First Set of Special Interrogatories (set one) no. 1, Ex. 1(c), at 3:15-4:11.
33. Plaintiff sued defendant Maynard because she wrote the July 23, 1993, letter to plaintiff and delivered a copy to	33. Plaintiff's deposition, Ex. 1(a) at 70:8-73:16.

defendant Rossi. Plaintiff has no other contact with defendant Maynard, does not know her and never heard of her.

CLAIM NO. 6, NO MERIT TO CLAIM FOR PUNITIVE DAMAGES:

(Complaint, paragraph XXII) (See discussion in Defendants State Bar, Maynard and Rossi's Memorandum of Points & Authorities In Support of Motion For Summary Judgment or Summary Adjudication, at p. 17.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
34. Defendant Maynard wrote to plaintiff on July 23, 1993, acknowledged receipt by the State Bar of plaintiff's letter to the State Bar dated	34. Plaintiff's deposition, Ex. 1(a), at 63:23-64:4, 70:8-73:16. Plaintiff's answers to defendants first set of special interrogatories (set

July 9, 1993, and indicated it had been referred to the State Bar's Office of General Counsel for reply. Defendant Maynard delivered a copy of her July 23, 1993, letter to defendant Rossi.	one) no. 1, Ex. 1(c), at 2:14-3:1.
35. By letter dated October 22, 1993, defendant Rossi wrote to plaintiff, acknowledged receipt of his letters to the State Bar dated July 9, 1993, and September 23, 1993, as well as his claim for damages dated October 7, 1993, and advised plaintiff of the statutory	35. Plaintiff's deposition, Ex. 1(a), at 59:7-68:22. Plaintiff's answers to defendants' first set of special interrogatories (set one) no. 1, Ex. 1(c), at 3:15-4:11.

(section 6070) and Rule of Court (958) bases for the State Bar's MCLE programs and procedures.	
36. At the time defendant Maynard wrote to plaintiff by letter dated July 23, 1993, the State Bar had already, effective July 19, 1993, placed plaintiff on administrative inactive status, as it had previously notified plaintiff it would by notices dated April 23, 1993, and June 29, 1993, which notices were received by plaintiff.	36. Plaintiff's deposition, Ex. 1(a), at 15:7-16:4, 17:1-19:21, 22:2-23:8, 24:3-25:5, 63:11-15, 65:8-24.
37. Other than the	37. Plaintiff's

correspondence mentioned in facts 34-36, plaintiff had no contact with defendant Rossi or defendant Maynard, did not know either of them and had never heard of them.	deposition, Ex. 1(a), at 60:13-61:21, 62:15-25, 66:4-12, 67:11-18, 71:1-25, 72:7-73:20.

CLAIM NO. 7, TORT CLAIM FOR DAMAGES AND AFFIRMATIVE DEFENSE NO. 2, DEFENDANT'S LICENSING ACTIVITY IMMUNITY UNDER GOVERNMENT CODE SECTIONS 818.4 AND 821.2 AND COMMON LAW QUASI-JUDICIAL AND LEGISLATIVE IMMUNITY FROM LIABILITY FOR DAMAGES:

(Complaint, paragraph XXIII and Answer, at 2:6-11) (See discussions in Defendants State Bar, Maynard and Rossi's Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Summary Adjudication, at pp. 15-16.)

UNDISPUTED MATERIAL FACTS	SUPPORTING EVIDENCE
38. Defendant State Bar is a state agency in the judicial branch of State government which serves as the administrative arm of the California Supreme Court in all matters relating to the admission, discipline and reinstatement of attorneys.	38. See fact 29 and the supporting evidence there listed.
39. At all times mentioned in plaintiff's complaint, defendants Rossi and Maynard were employees of the State Bar acting within the scope and course of their employment	39. See facts 30 and 31 and the supporting evidence there listed.

and official duties.

40. On or about October 13, 1993, plaintiff filed with defendant State Bar a "Claim of Damages".

40. Complaint, at 11:9-11. Admitted by defendants.

41. Plaintiff's Claim of Damages was denied by the Board of Governors of the State Bar on or about November 5, 1993.

41. Plaintiff's Complaint, at 11:9-11. Admitted by defendants

42. Both section 6070 of the Business & Professions Code and rule 958, California Rules of Court provide, inter alia, that a member who fails to satisfy the requirement of the State Bar's MCLE Program ". . . <u>shall be</u>

42. Business & Professions Code section 6070 and rule 958, California Rules of Court.

enrolled as an inactive member" of the State Bar under rules adopted by the Board of Governors of the State Bar. (Emp. added.)

43. Both section 6070 and rule 958 require the State Bar to adopt rules for and establish and administer a minimum continuing legal education program mandating that each member not exempt complete 36 hours of legal study within 36 month periods designated by the State Bar.

43. Business & Professions Code section 6070, rule 958, California Rules of Court.

44. Plaintiff may return to active status

44. MCLE Regulations sections 15.1-15.2.

simply by completing the required hours of MCLE study and furnishing proof of such compliance with whatever fees may be due, if any.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

LEW WARDEN,

Plaintiff,

vs. No. 734372-4

THE STATE BAR OF CALIFORNIA, KAHALA MOTOYAMA, LORNA MAYNARD, CAROLE ROSSI, et al.,

Defendants.

_____/

DEPOSITION OF LEW WARDEN

Thursday, August 18, 1994

Reported by:

TERRI FEVURLY

CSR #5238

NANCY SORENSEN

COURT REPORTING SERVICE

41 SUTTER STREET

SUITE 505

SAN FRANCISCO 94104

CSR #5982 (415) 986-4624

APPENDIX 3

LINE PAGE 11

21 Q. All right. Moving along, then, we will mark
22 this as next in order.
23 (A 17-page document entitled "California
24 Minimum Continuing Legal Education
25 Program Information, Rules and

LINE PAGE 12

1 Regulations, Guidelines, Continuing
2 Education Log" was marked as Defendant's
3 Exhibit No. 3 for identification.)
4 MR. BABCOCK: Q. Do you recognize this
5 document?
6 A. Is that the Exhibit C of your deposition? I
7 have (b) item is pamphlet–
8 Q. No, this is (b), a pamphlet or booklet
9 entitled "California Minimum Continuing Legal Education
10 Program."
11 A. That would be attached as Exhibit C to your

deposition materials or, rather, to your–

Q. Demurrer?

A. Demurrer materials, right.

No, I did not receive that either. I don't have any copy of that in the file, except what you sent me.

Q. And you have no independent recollection of ever receiving that in the mail?

A. First I knew about this program was people in the office talking about it. I really didn't know it was going on. I didn't receive that material. There was a lot of complaining going on about what the program was and ridiculous posture it put us all in.

Q. When was that complaining going on? When did

LINE PAGE 13

you first hear about MCLE?

A. A couple of years ago.

Q. '92?

A. It was at least a year before you sent me

notices concerning it. It was about a year.

Q. Okay. And tell me a little bit about that.

You found out about it literally–

A. I heard about the program from other lawyers that I'm talking to, and everybody was complaining about it, as I recall, and they were complaining to me what they had to do, and what they did, and how ridiculous the programs were and what a waste of time it was. I got the impression that I had three years within which to either comply with the program or get out of the Bar, and so I figured I could practice my profession for three years and by that time I would either be dead or too old to work anyhow. Turned out not to be the case. Sometimes you are disappointed in life.

. . .

But let me get this straight, then. So, in 1992 you were aware, then, that you had three years to

LINE PAGE 14

complete this?

A. I can't complain. . . I can't assert the date positively. It could have been in '93, but it was certainly before I started writing to you about it, and

. . .

. . . But my intention was not to comply, because I had three years in which to continue, so why bother? By that time I figured I would be retired.

LINE PAGE 15

Q. So, at least, prior to getting notices that you were not in compliance with MCLE, is it a fair statement to say that you, at least, were aware of the MCLE program and that there were certain requirements that applied to you?

A. I was aware that I had three years within which to either comply with the educational program that I and all my associates disagree with profoundly or retire, stop practicing law.

Q. And if you didn't?

17 A. Distinct surprise to me to receive your
18 notices that my number is up whenever it was last year.
19 Q. When you say that you had to stop or retire,
20 you were aware, then, that if you didn't comply, that
21 one of the sanctions might be that you would be placed
22 inactive?
23 A. Either that or I could challenge the program,
24 which I chose to do.
25 Q. But you knew one of the sanctions was that you

LINE PAGE 16

1 could be placed inactive?
2 A. Whether I could be placed inactive legally or
3 not, but I understood there would be an attempt to
4 impose such a sanction.

LINE PAGE 17

1 Q. Looking at. . . I would like to get the next
2 exhibit in order, which corresponds to (c) on the Notice
3 to Produce. It's a letter dated April 23rd, 1993 from
4 defendant State Bar to plaintiff Lew Moore Warden, Jr.

(A 1-page letter from The State Bar of California to Lew Moore Warden, Jr., dated 4-23-93, was marked as Defendant's Exhibit No. 4 for identification.)

MR. BABCOCK: Q. Have you, did you receive a copy of this item that's next in order?

A. Is there another page to it? I don't know. I think I got that. My memory is I did get a letter dated April 23. . . .

. . .

A. I've got it. I made the note on the file that I paid the fee, non-compliance fee. I had paid that already by that time and–

Q. So I'm clear on this, looking at what we've marked as State Bar 4 to this deposition, this document

LINE PAGE 18

dated April 23rd, '93, you are looking in your file and you received this document?

A. Yes.

. . .

Q. Let me just go through these exhibits. I've got some copies of your letters that I want to talk about.

The next one in order is State Bar 5, which corresponds to, I believe, request (d) from the Notice of Deposition. It's a letter of June 29th, 1993.

(A 1-page letter from the State Bar of California to Lew Moore Warden, Jr., dated 6-29-93, was marked as Defendant's Exhibit No. 5 for identification.)

MR. BABCOCK: Q. Let me just show you a copy of that. Do you have a copy of what we will call State Bar 5?

A. I believe I do, yeah.

Q. You received that letter, did you?

A. Yes.

Q. And you read it?

19 A. Yeah.

20 Q. And you understood it?

21 A. Yeah.

LINE PAGE 21

. . .

4 Q. Again, is it fair to say that at this point

5 you determined that you were not going to fill out the

6 compliance card?

7 A. I was not going to participate in the program.

8 The compliance card, I believe, as I recall, gave me one

9 option, to say I complied.

10 Q. Right

11 A. Since I hadn't complied, there's no occasion

12 to fill out the card.

. . .

22 A. I resolved at that time to either get you to

23 back off on it by conference or to take whatever steps

24 had to be taken to litigate it.

LINE PAGE 22

. . .

. . . It's a letter of July 30th, 1993 to Lew Moore Warden at 114 Parrott Street, San Leandro.

(A 1-page letter from The State Bar of California to Lew Moore Warden, Jr., dated 7-30-93, was marked as Defendant's Exhibit No. 7 for identification.)

MR. BABCOCK: Q. Do you have a copy of this item, this letter?

A. I've got one, July 23rd, that came before that.

Q. You do?

A. Let me see that one. From Lorna Maynard.

Q. Oh, right, I've got that one there, too. Let's go in order here on this one. Can we stick with this one, the one July 30th?

A. July 30th?

Q. Right.

20 A. Yes, I got that.

21 Q. Okay. That's what we marked as State Bar

22 Exhibit 7 to this deposition. And you have this letter

23 in your file?

24 A. Yes.

25 Q. And you received this letter?

LINE PAGE 23

1 A. Oh, yeah.

2 Q. And you read it?

3 A. Oh, yeah.

4 Q. You understood it?

5 A. I did indeed.

6 Q. You understood that this letter had placed you

7 in inactive status, correct?

8 A. Yes. They put me on a status that caused me

9 to look up and see what inactive status meant besides

10 disbarment, if anything.

LINE PAGE 24

. . .

12 Q. Let's go to that letter. That's a letter

13 dated July 23rd?

14 A. July 23rd, right.

15 Q. And there is a copy of that letter that you

16 have?

17 A. Correct.

18 Q. Right. And this would be, we will call this

19 State Bar 8.

20 (A 1-page letter on the letterhead of The

21 State Bar of California from Lorna

22 Maynard to Lew Warden, dated 7-23-93, was

23 marked as Defendant's Exhibit No. 8 for

24 identification.)

25 MR. BABCOCK: Q. You received this letter

LINE PAGE 25

1 from Lorna Maynard, is that right?

2 A. Right.

3 Q. Do you have a date stamp when you receive it

4 in your office?

A. No.

Q. Okay. And what did you take to be the meaning of this letter?

A. That we have a meeting and discuss it. Somebody in the hierarchy here would sit down and look at the situation and look at my grievances and have a conference of some kind on it.

Q. And did you believe that this excused you from the requirements that had been set forth in the previous letters?

A. I believe that I was excused in the requirement by virtue of the unconstitutionality of the statute.. . .

LINE PAGE 36

. . .

Q. When you heard about MCLE in 1992–

A. Sometime in there, yes. I'm not quite sure of the date, but it was in that period of time.

Q. Did you write to any member of the Board of

21 Governors and complain about it?

22 A. No.

23 Q. Did you write to the Supreme Court?

24 A. No.

25 Q. Did you write to your legislator?

LINE PAGE 37

1 A. No. I have since then, but. . .

2 Q. But that's all been subsequent to your–

3 A. Oh, yeah.

4 Q. –suspension?

5 A. Yeah. I didn't really appreciate the

6 monstrousness of the organization until I got deeply

7 into it.

LINE PAGE 100

. . .

15 Q. Why do you think you have a right to a hearing

16 in this matter?

17 A. Because my license to earn my living was

18 suspended without a hearing.

19 Q. Even though you were advised well in advance
20 of your suspension that this was a requirement to
21 practice law?
22 A. Yeah, but I think the hearing before a judge
23 would have created a record in which the issue of the
24 constitutional [sic] statute would have been addressed.

. . .

LINE PAGE 103

1 Q. You never showed up at an MCLE-sponsored
2 lecture?
3 A. And never will. That I promise you.

SUPREME COURT OF THE STATE OF CALIFORNIA

LEW WARDEN Plaintiff/Appellant v. THE STATE BAR OF CALIFORNIA et al., Defendants/Respondents	)	No.

PETITION FOR REVIEW BY THE STATE BAR OF CALIFORNIA AND TRANSFER OF RELATED CAUSE PENDING BEFORE SAME COURT OF APPEAL AND REQUEST TO EXPEDITE REVIEW AND DISPOSITION

From the Opinion of the Court of Appeal
First Appellate District, Division Five

On Appeal from the Judgment of the Superior Court
of the State of California, County of Alameda

Honorable James R. Lambden, and Sandra L. Margulies

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APPENDIX 4

[EXCERPT ONLY]

PETITION STARTING ON PAGE 8

. . .

It is undisputed that the MCLE program applies to "almost all California attorneys, while exempting . . . a relatively small number" from its educational requirements. (Opinion, pp. 13-14; see also conc. and dis. opn. Of Haerle, J., at p. 4 [noting that as to the three exemption categories that the court found unconstitutional, "common sense tells us [the] figure could not be more than a few hundred"].) Indeed, the State Bar's official records show that of the total number of exemptions granted to active members in the period 1994-1996 (based on the sum of year-end figures),[13] only 144 (.14%) members were exempted as retired judges, 48 (.05%) as officers and elected officials of the State, and 376 (.4%) as

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[13]Pursuant to California Rule of Court, rule 958(b), membership of the State Bar is divided into three compliance groups, so that completion of the MCLE credit hours and reporting by bar membership are staggered over three years. The total here are derived from the sum of exemptions in each category at the end of each year during the period 1994-1996.

professors of accredited law schools.[14] Similarly, only a small number of lawyers (1,408 to date) have been enrolled in administrative inactive status for failing to comply with the MCLE requirements. In contrast, as the Court of Appeal indicated, almost all active bar members have complied. In addition, official bar records show that an industry of 1,138 certified providers has developed to meet MCLE demands.[15]

. . .

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[14]The largest number of exemptions were for those in the categories of federal or state employees–2,477 (2.3%) and 1,611 (1.5%) respectively–the two categories which the Court of Appeal indicated were constitutional. (Opinions, at p. 11). The relatively small number of exempted members is furthered evidenced in the record of the related appeal in Greenberg v. State Bar, Appellants' App. In Lieu of Clerk's Tr., at pp. 600-602.

[15]This Court may take judicial notice of all the foregoing matters under Evidence Code section 452, subdivisions (c), (g) & (h). Evid. Code, §459; Smith v.State Bar (1989) 212 Cal.App.3d 971, 975-976.